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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

DEC 3 - 1990

In re Application of

**VALLEY PUBLIC TELEVISION, INC.**

For Construction Permit for a New  
Television Station on Channel \*39  
in Bakersfield, California

Federal Communications Commission  
Office of the Secretary

File No. BPET-900904KF

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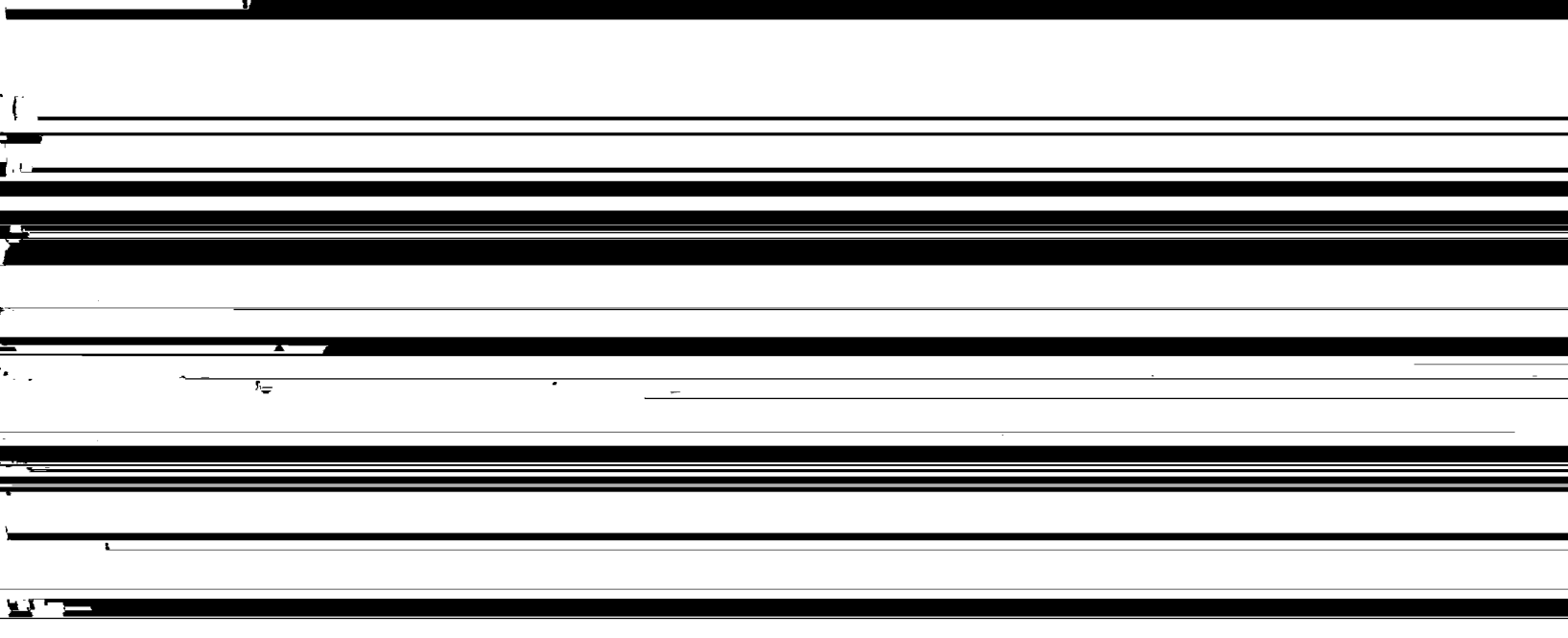
To: The Commission

DEC 5 1990

**OPPOSITION TO  
REQUEST FOR WAIVER**

VIDEO SERVICES

Community Television of Southern California ("CTSC")<sup>1</sup>  
hereby opposes Valley Public Television, Inc.'s ("VPT") Request  
for a Waiver of Section 73.610 of the Commission's rules  
("Waiver Request"). VPT seeks a waiver of that rule so that it  
may locate the antenna for its proposed station at a site which  
is short-spaced to the allotment for Channel \*25 in Ridgecrest,  
California. VPT has failed to bear the heavy burden required  
of those seeking a waiver of the Commission's rules, and has  
not demonstrated that the public interest will be served by  
grant of its waiver request. Accordingly, its Waiver Request



I. VPT Has Not Established That Grant of Its  
Waiver Request Will Serve the Public Interest

able. Orange Park Florida TV Inc. v. FCC, 811 F.2d 664, 669 (D.C. Cir. 1987), citing Townsend Broadcasting Corp., 62 F.C.C.2d 511,512 (1976); North Texas Media, Inc. v. FCC, supra. As the Commission stated in Townsend Broadcasting Corp., supra at 512, the showing that fully-spaced sites are unavailable must be based on "concrete support, preferably documentary, that suitable, non-short-spaced spaced sites are unavailable." VPT has failed to make that showing here, and, it cannot. CTSC's proposal demonstrates that such fully-spaced sites are in fact available. On this basis alone, VPT's waiver request must be denied. See Nelson County Broadcasting Co., 64 F.C.C.2d 932 (1977); Townsend Broadcasting Corp., supra; Trend Broadcasting, Inc., 18 F.C.C.2d 749 (1969).

Perhaps in recognition of this problem, VPT claims that, although there are fully spaced sites available, those sites are "inferior" to its short-spaced site. Waiver Request at 3. However, VPT does not offer any explanation as to why the alternative sites are inferior, and its bare, unsupported assertion can not relieve it of the obligation to meet this established threshold showing. Townsend Broadcasting Corp., supra.<sup>3</sup>

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3 VPT also argues that the Commission should take into account its goal of fostering the growth of noncommercial services in evaluating VPT's admission that fully spaced sites are available. Waiver Request at 3. This argument is mystifying: CTSC also proposes a non-commercial service, yet managed to find a fully spaced site that serves Bakersfield and its surrounding area. Furthermore, VPT has provided no precedent or policy explaining why the mileage separation rules, which  
(continued...)

Further, the cases on which VPT relies to justify the grant of its waiver request do not support its request. None of those cases involved comparative proceedings in which one of the applicants had proposed a full-spaced site. See Donovan Burke, 104 F.C.C.2d 843 (1986). Moreover, those cases are distinguishable on other grounds; in each there were substantial other public interest benefits which supported grant of the waiver. For example, while the Commission granted a waiver in Caloosa Television Corp., 3 FCC Rcd 3656 (1988), even though the applicant did not show that there were no fully-spaced sites available, it did so only "because of the unusual combination of public interest factors present" in that case. Id. at 3657. Those factors included (a) that the proposed site would provide additional service to more than 60,000 people and a provide a first off-the-air ABC network service to more than 34,000 people, id. at 3658, (b) that the choice of sites was "severely limited by the proximity of the Gulf of Mexico and extensive swamp areas." id., and (c) that, while the amount of short-spacing was "not minimal," (11.5 out of the required 329 kilometers or 3.5%), it was nevertheless within the range of previous waivers. Id.<sup>4</sup>

3(...continued)

None of those factors are present here. First, while VPT claims that its proposal will provide non-commercial service to 88,707 more people than CTSC's proposal, Waiver Request at 3, that claim rests on an erroneous comparison. As the attached Statement of Robert Hammett attests, VPT's claim that it will serve more people results from VPT's use of data obtained from the Kern County Board of Trade and Economic Development, while CTSC used the official 1980 Census Data as required by the Commission. See Statement of Robert L. Hammett ("Hammett Statement") at p. 1. When using the same data, the difference in the population served by CTSC and by VPT is minuscule: some 6,390 more people out of more than 330,000, less than 2%.<sup>5</sup>

Secondly, VPT has not made any comparable showing that the available sites are constrained by geographic limitations, and it can not. There are adequate sites available which will permit it to serve Bakersfield fully. Lastly, VPT's proposed short-spacing (9.8 out of the required 95 kilometers or 10.24%)

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4(...continued)

demonstrate that there were no fully spaced sites available. Thus, it stated that it was

reaffirm[ing] [its] intent generally to require applicants proposing short-spaced sites to make a threshold showing that suitable fully spaced or less short-spaced sites are unavailable.

Caloosa Television Corp., 4 FCC Rcd 4762 (1989).

5 As Mr. Hammett also notes, updated Census Data indicates that the relative difference in the population served by the two applicants remains unchanged. Hammett Statement at p. 1.

is not only substantially greater than that in Caloosa, it is greater than those cited in that case by the Commission as defining the acceptable range.<sup>6</sup>

The other cases cited by VPT are similarly inapposite. Thus, in Pappas Telecasting, Inc., 49 R.R.2d 1688 (1981), the Commission granted the short-spacing waiver request because the proposed short-spacing was de minimis: 2.4 miles out of the required 175, i.e., 1.4% of the required separation and the short-spaced site would permit Pappas to serve some 54,000 additional people. Id. at 1689. Similarly, in The Outlet Co., 12 R.R.2d 387 (1968), the applicant demonstrated that the FAA had disapproved of other possible sites and that there were no other fully-spaced sites available which could improve service, id. at 389,<sup>7</sup> while in KXO, Inc., 6 R.R.2d 834 (1966), the applicant showed that its proposal would provide a gain in service to 23,365 people, id. at 835, and that, because of constraints imposed by other allotments and physical characteris-

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6 For example, the Commission cited Midcontinent Broadcasting Co., 45 F.C.C. 1798 (1964), where a shortfall of 14.2 miles out of the required 190 (7.4%) was approved. 3 FCC Rcd at 3658.

7 Furthermore, the applicant in that proceeding proposed to use a directional antenna that would provide "equivalent protection" to a co-channel station. Id. at 391. However, Commission policy no longer allows use of "equivalent protection" theories in UHF licensing, and accordingly Outlet is no longer persuasive authority in this context. See Caloosa Television Corp., supra, 3 FCC Rcd at 3659, note 1, citing New Jersey Public Broadcasting Authority, 50 RR 2d 251 (1981). See also Pappas Telecasting, Inc., supra, 49 RR 2d at 1689.

tics of the area, the short-spaced site was the only feasible site.

In the present case, none of these factors are present. VPT's proposed short-spacing of 9.8 kilometers is far from de minimis, and there are numerous other suitable, fully-spaced sites from which VPT could serve Bakersfield. Further, VPT's application will provide service to only some 6,000 more people as compared to CTSC's fully spaced proposal, see Hammett Statement at p. 2.<sup>8</sup>

**B. VPT Has Not Advanced Any Other Public Interest Factors Which Would Justify Grant of its Waiver Request**

Notwithstanding VPT's inability to make the required threshold showing, it suggests that other public interest factors warrant the grant of its waiver request. VPT's showing is unpersuasive.

VPT cites five such factors: (1) that the short-spacing is small, (2) that there will be no loss of service, (3) that there are no environmental factors, (4) that its site is superior to any other, and (5) that grant of its waiver request will allow the Commission to evaluate comparatively its application and the application of CTSC. As to the first factor, the magnitude of short-spacing requested by VPT is not "small." In

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<sup>8</sup> It should also be noted that CTSC has applied for and received a grant of an application to operate a translator station in Lake Isabella. That facility will permit it to serve the largest population center to the east of Bakersfield included within VPT's predicted Grade B contour, but outside CTSC's.

absolute terms, it is among the larger short-spacing requests

of the type which justified



also claims that the height of the site will permit it to provide a better signal to Bakersfield.

The claims are specious. As shown in the Hammett Statement, both VPT's and CTSC's proposed sites are located to the east of Bakersfield and both have several television towers situated at the same site. Thus, VPT's site is not any more of an antenna farm or more desirable from antenna orientation perspective than CTSC's. In fact, as Hammett's Statement demonstrates, the strength of VPT's signal in Bakersfield is actually inferior to that provided by CTSC. Hammett Statement at p. 2. In addition, VPT's claim that its proposed site will permit it to serve a greater population is a gross exaggeration. VPT's proposed station will serve at best 1.9% more people than CTSC's fully-spaced proposal.

Finally, VPT relies on Azalea Corp., 31 F.C.C.2d 561 (1971), and Anax Broadcasting, 87 F.C.C.2d 483 (1981), for the proposition that its waiver should be granted so that the Commission can consider its application comparatively with CTSC's. Waiver Request at 6-7. However, those two cases are irrelevant since they deal with the issue of whether the Commission should allow untimely amendments -- not whether it should grant waiver requests.<sup>11</sup>

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<sup>11</sup> However, even if the Commission were, for the first time, to conclude that having the opportunity to consider competing applicants was relevant to a waiver request, it would not support the grant of VPT's request. As is the case with respect to untimely amendments, that factor can not, standing alone, establish that the public interest would be served by  
(continued...)

### CONCLUSION


VPT has failed to make the required threshold showing that fully spaced sites are unavailable. In addition, it has failed establish other public interest factors justifying its Waiver Request. Accordingly, CTSC urges the Commission to deny VPT's Waiver Request.

Respectfully submitted,

  
/s/ Theodore D. Frank  
Theodore D. Frank

Of Counsel:

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/s/ Paul Feldman  
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December 3, 1990

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11(...continued)  
grant of the waiver. Cf. Royce Intern. Broadcasting Co. v. FCC, 820 F.2d 1332, 1337-38 (D.C. Cir. 1987), citing Belo Broadcasting Corp., 68 F.C.C.2d 1313,1322 (1978); Shoblom Broadcasting, 93 F.C.C.2d 1027, 1030 (1983). Indeed, if it was sufficient to justify grant of a waiver, the Commission's rules would effectively be rendered meaningless in any comparative situation.

Consequently, the value of giving the Commission a choice among competing applicants must be one among many that must be weighed in determining whether to grant a waiver. Here, it is clear that, when weighed against VPT's failure to make the required threshold showing that no fully spaced or less short-spaced sites are available and its failure to advance any other substantial public interest benefit that would derive from its short-spaced proposal, this factor does not justify the grant of its Waiver Request.

**COMMUNITY TELEVISION  
OF SOUTHERN CALIFORNIA**

**STATEMENT OF ROBERT L. HAMMETT, CONSULTING ENGINEER**

The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by Community Television of Southern California ("Community"), applicant for a new non-commercial television broadcast station to operate on Channel \*39 in Bakersfield, California, to study the Request for Waiver dated November 6, 1990, filed by Valley Public Television, Inc. ("Valley").

Valley seeks to amend its application for Channel \*39 in Bakersfield, which is mutually exclusive with the pending application of Community Television of Southern California, to include a request for waiver of Sections 73.610 and 73.698 of the Commission's Rules. As detailed in the Engineering Statement of Hammett & Edison, Inc., dated October 18, 1990, the Valley proposal specified a transmitter site at Breckenridge Mountain that would be short-spaced to the Channel \*25 allotment to Ridgecrest, California. The request for waiver recently filed by Valley offers as justification for waiver the following unsupported technical assertions:

1. Breckenridge Mountain is a unique antenna farm,
2. Valley would reach 421,000 persons with Grade B service as compared to Community's service to 332,293 persons.

COMMUNITY TELEVISION  
OF SOUTHERN CALIFORNIA

**COMMUNITY TELEVISION  
OF SOUTHERN CALIFORNIA**

Taft Heights, and South Taft, which are not within the Valley Grade B contour. The Valley Grade B contour extends further east into very mountainous regions. Much of the additional area that would be served by Valley is unpopulated.

**VALLEY WOULD PROVIDE INFERIOR SERVICE TO BAKERSFIELD**

The city of Bakersfield is within the 80 dBu contour of both applicants. As determined from the Community application, the effective antenna height above average terrain in the direction toward the center of Bakersfield at N 255° E is 871 meters. The effective radiated power in that direction is 24.4 dBk. According to the FCC F(50,50) propagation curves, the field strength at a distance of 26.5 kilometers in the center of Bakersfield would be approximately 96 dBu. By contrast, Valley would provide a weaker signal in Bakersfield. Its antenna height above average terrain in the direction N 258° E from the Mt. Breckenridge proposal is shown by its applications to be 1240 meters. The proposed effective radiated power in that direction is 21.6 dBk and the median field strength at 39.8 kilometers at the center of Bakersfield would be approximately 87 dBu.

Based on the above factual data, it is my considered opinion that the Valley proposal would deliver approximately 9 dB less signal strength to Bakersfield than would Community. Valley's claim, therefore, that the Breckenridge site deserves a waiver of the spacing requirements is not supported by the facts regarding the coverage of Bakersfield and environs. Valley's assertions No. 2 and No. 4 above are not factually correct.

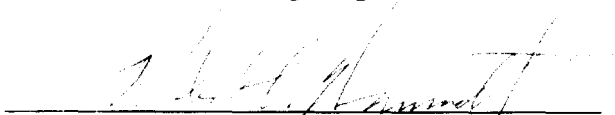
In its assertion No. 3 above, Valley concedes that potential transmitter sites are available that are not short-spaced. The facts do not support the Valley assertion that all such sites are inferior to Breckenridge.

**LIST OF FIGURES**

In carrying out these engineering studies, the following attached figure was prepared under my direct supervision:

1. Map showing comparative Grade B coverage of competing proposals.

HAMMETT & EDISON, INC.  
Consulting Engineers

  
\_\_\_\_\_  
Robert L. Hammett, P.E.

November 27, 1990

# AFFIDAVIT

State of California     )  
                                  ) ss:  
County of San Mateo    )

Robert L. Hammett, being first duly sworn upon oath, deposes and says:

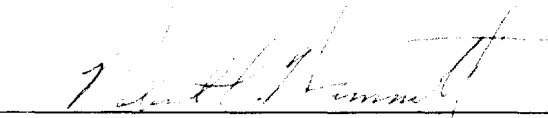
1. That he is a qualified Registered Professional Engineer, holds California Registration No. E-007601 which expires September 30, 1994, is also registered in the State of Texas and in the District of Columbia, and is a consultant to the firm of Hammett & Edison, Inc., Consulting Engineers, with offices located near the city of San Francisco, California,

2. That he graduated from Stanford University in 1942, received a Master of Arts Degree in Electrical Engineering from Stanford University in 1943, was a Research Associate at Radio Research Laboratory, Harvard University, from 1943 through 1945, and has practiced as a consulting engineer since 1946,

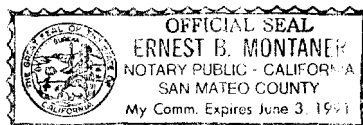
3. That the firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by Community Television of Southern California, applicant for a new non-commercial television broadcast station to operate on Channel \*39 in Bakersfield, California, to study the Request for Waiver dated November 6, 1990, filed by Valley Public Television, Inc.,

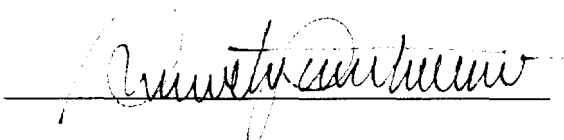
4. That such engineering work has been carried out by him or under his direction and that the results thereof are attached hereto and form a part of this affidavit, and

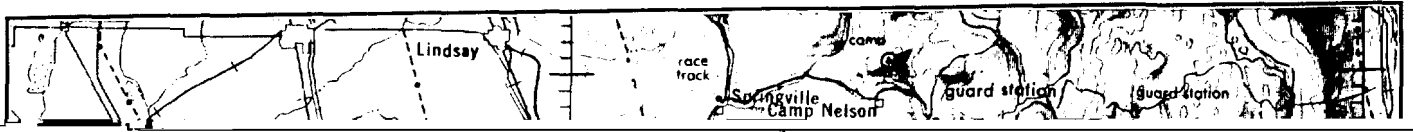
5. That the foregoing statement and the report regarding the aforementioned engineering work are true and correct of his own knowledge except such statements made therein on information and belief, and as to such statements, he believes them to be true.

  
Robert L. Hammett, P.E.

Subscribed and sworn to before me this 27th day of November, 1990







CERTIFICATE OF SERVICE

I, La-Veta C. Waller hereby certify that I have on this 3rd day of December, 1990, caused copies of the foregoing "Opposition to Request for Waiver" to be served by first class U.S. mail, postage prepaid, upon the following:

Richard Hildreth, Esquire  
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1225 Connecticut Avenue, N.W.  
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Washington, D.C. 20554

  
La-Veta C. Waller

\*By Hand Delivery